IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1970
No. _____

SWANNEY-McDONALD, Inc.,

Petitioner,

vs.

OTTO D. GRAY, etc., et al.,

Respondents.

SWANNEY-McDONALD, Inc.,

Petitioner,

vs.

WILLIAM LAWMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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The petitioner, Swanney-McDonald, Inc. respectfully prays that a writ of certiorari issue

to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 4, 1971.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered - only a Memorandum for judgment - by the United States District Court, Central District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 4, 1971. A timely petition for rehearing en banc was denied February 1, 1971, and this petition for certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether tow truck drivers of a local automotive roadside service garage, operating in the South Central part of the City of Los Angeles (some 200 miles from another State) in competition with other such service garages in

the area and doing no out-of-state business, are "engaged in commerce" among the several states within the scope and purview of Section 3(b), (29 U.S.C. 203 (b)) of the Fair Labor Standards Act (making the overtime provisions of such Act applicable to them), by reason of the fact that some of the service calls processed (less than 1%) are to motorists using local freeways within the City that are designated interstate highways.

2. Whether the automotive roadside services of a local garage are not for "resale," within the purview of the Retail Exemption provisions of the Fair Labor Standards Act (Section 13(a) (2) of the Act - 29 U.S.C. 213 (a)(2)) where some of its customers are local auto body shops and auto dealers who do not pass on the tow charges to their customers, and a local auto club charging membership fees which does not bill its members for such services (the members also paying the garage direct for services beyond a limited area).

3. Whether a civil action seeking recovery of overtime compensation under the Fair Labor Standards Act (29 U.S.C. 201-219) commenced by one individual, the complaint being later amended to include a number of additional plaintiffs, setting forth but a single cause of action and signed by the one individual only, is a "collective action" within the purview of 29 U.S.C. 256, so as not to be deemed "commenced" as to the running of the statute of limitations as to the added plaintiffs until their

respective written consents have been filed with the court.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. 203 (b)

As used in this chapter -

"(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof."

29 U.S.C. 213 (a) (2) (as it was worded at time applicable to this action - the particular provisions involved has not changed by amendments)

"The provisions of section 206 and 207 of this title shall not apply with respect to -

"(2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, if such establishment -

. . .

"(iv) is in such an enterprise as has an annual dollar volume of sales (exclusive of excise taxes at the retail level which are separately stated) which is less than $250,000.

"A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or both) is not for resale and is recognized as retail sales or services in the particular industry." (Underscoring added.)

29 U.S.C. 216 (b)

"Any employer who violates the provisions of Section 206 or 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees simiarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. . . ."

(Underscoring added.)

29 U. S. C. 256

"In determining when an action is commenced for the purposes of section 255 of this title, an action commenced on or after May 14, 1947 . . . shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938 . . . it shall be considered to be commenced in the case of any individual claimant -

"(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party is filed on such date in the court in which the action is brought; or

"(b) if such written consent was not so filed or if his name did not so appear - on the subsequent date on which such written consent is filed in the court in which the action was commenced." (Underscoring added.)

STATEMENT OF THE CASE

The petitioner herein, is a California corporation operating a small automotive roadside service business, providing emergency roadside service and tow service to disabled motorists in the South Central section of the City of Los Angeles. All of its services are within the metropolitan area of Los Angeles and in competition with other such garages.

Respondents are tow truck drivers who were employed by petitioner in the operation of the business. As such tow truck drivers, they serviced and towed motor vehicles on streets, alleys, highways, public and private property and freeways in the area of such operation. Some of the freeways on which motorists were serviced were designated as interstate highways. Less than 1% of the total service calls of this service garage were for service to motorists on these freeways which passed through the area of their operations in the City of Los Angeles.

Petitioner is one of some 20 automotive service garages in the City of Los Angeles designated by the Los Angeles Police Commission as an official police garage. It has no contract with the police department and simply serves at the pleasure of the police department. It is not paid anything by the police department,

collection having to be made from the owners of the vehicles that are serviced. Every bit of the business is individual piece work.

Petitioner is also an official National Auto Club garage, in the South Central section of Los Angeles. The National Auto Club operates only in California. It charges the Auto Club a set rate for service to any member within a radius of five miles - beyond five miles the member must pay petitioner for services at the regular rate.

Petitioner, and thus the respondent drivers, tow vehicles to a number of automobile body repair shops and automobile dealers. Payment is made for this service by the auto body shop or auto dealer. (Evidence was presented in this case to the effect that these charges are not passed on to their customers. No contrary evidence was presented.) (Rep. Tr. 105, lines 19-21; p. 106; p. 129, lines 23 through 69 p. 132; p. 133, lines 13-15.)

Respondents filed actions in the U. S. District Court, Central District of California seeking recovery of overtime compensation under the Fair Labor Standards Act (Cl. Tr. pp. 2-14).

Jurisdiction was conferred on the District Court by 28 U. S. C. 1337 giving jurisdiction of all suits under any law regulating commerce, and under 29 U. S. C. 216 (b), providing that suits

seeking recovery for unpaid overtime compensation under the Fair Labor Standards Act (29 U. S. C. 207) may be maintained in any court of competent jurisdiction.

The first action filed, No. 66-1276, was by Respondent Otto D. Gray an individual, who verified the complaint (Cl. Tr. pp. 2-6). This complaint was later amended to add ten additional plaintiffs, none of whom signed the complaint, and no individual causes of action were set forth for them, it being merely a single cause of action (Cl. Tr. pp. 6-10). Action was then filed on behalf of Respondent William Lawman (Cl. Tr. pp. 11-14) and the actions were consolidated by the Court for all purposes (Cl. Tr. p. 27).

The issue was raised as to the running of the two year statute of limitations (29 U. S. C. 255) and on motion to exclude evidence at the commencement of the trial, the court ruled that the signing of answers to interrogatories by the respective plaintiffs served as written consents to become parties plaintiff and stopped the running of the statute of limitations as of such date (Cl. Tr. p. 206, lines 1-5; p. 218).

On trial of the actions evidence was introduced that the petitioner's annual dollar volume of service sales was less than $250,000, that all business was in California. that the services were not for resale and that petitioner was recognized as a retail service business within the automotive tow service garage industry



(Finding No. 7, Cl. Tr. p. 274, lines 15-23; Rep. Tr. p. 145, lines 1-5 and lines 23 through line 5 of p. 146; p. 198, lines 15-21; p. 156 lines 20-25; p. 157, lines 16-19; p. 204, lines 4-10; p. 205, line 25 through line 8, p. 206; p. 209, lines 2-9; p. 210, lines 6-11).

While the respondents did not plead that in the performance of their work for petitioner they were "engaged in commerce" and the Court did not find that the activities of the employees-respondents were "in commerce" (Cl. Tr. pp. 2-14, pp. 273 and 274), it found that this petitioner's activities were so closely related to the movement of traffic on the various interstate highways passing through petitioner's operational area that such activities constitute "commerce" as defined by the Fair Labor Standards Act (Finding No. 6, Cl. Tr. 274, lines 11-14).

However, the court found that petitioner was a retail service establishment within the exemption contained in 29 U.S.C. 213 (a) (2) and thus exempted from the provisions of the overtime requirements of such Act, ruling that the respondents take nothing by their actions (Cl. Tr. p. 274, lines 7 through 15 of p. 275).

Respondents appealed the decision to the Court of Appeal for the Ninth Circuit contending that the retail exemption did not apply and that the adding of the names as plaintiffs to the suit started by Otto D. Gray did not make it a collective action requiring the filing of written consents with the court to stop the running of the statute of limitations (Cl. Tr. 289).

Petitioner filed a cross appeal to such Court of Appeal as to the determination by the District Court that the activities of the petitioner (and inferentially the respondents) constituted "commerce" as defined by the Fair Labor Standards Act (29 U.S.C. 203 (b)) (Cl. Tr. 293, 294).

A motion filed on behalf of George P. Schultz, Secretary of Labor, United States Department of Labor, for leave to file a brief as Amicus Curiae was granted by the Court of Appeal, and such brief was filed.

The Court of Appeal ruled that (A) the District Court correctly determined that the employees respondents were engaged in interstate commerce under the Fair Labor Standards by responding to service calls on interstate highways passing through the area serviced in the City of Los Angeles by petitioner, and the fact that the contact was de minimis was irrelevant, (B) that petitioner was not within the retail exemption of the Act because (indirectly) the services to the auto shops and the auto club were for "resale," and (C) that (in effect) the adding of additional plaintiffs names to the action started by respondent Otto D. Gray (without the plaintiffs signing) did not make it a collective action requiring filing of consents by such plaintiffs to toll the statute of limitations, reversed the judgment of the District Court and remanded the case for further proceedings consistent with the views expressed by the Court of Appeal in its Opinion (see Appendix).

A petition for rehearing made by petitioner herein was denied.

REASONS FOR GRANTING THE WRIT

1. The Question of Whether Local Auto Service Tow Truck Drivers Are "In Commerce" Within the Purview of the Fair Labor Standards Act By Reason of Occasionally Servicing Motorists on Interstate Highways in Their Local Area, Is One of Substance Never Previously Determined By This Court and One Which Affects the Operation of Automobile Service Garages in Every Town Across This Nation.

It is important that this question be finally determined by this court so that the uncertainty which now exists in the industry and which affects actions by individuals and the Secretary of Labor, involving this question can be eliminated.

In this motorized society in which we now live, the local automotive roadside service garage is a part of every community and settlement. If the motorist runs out of gas, has a flat tire, has a dead battery, experiences vapor lock with his car engine or becomes involved in a collision or mishap, he relies - as do the local police in the area - on the local automobile service garage to send their tow truck with the auto service employee to his assistance.

Such service garages are usually small independent businesses servicing a very limited local area and not in any manner involved in commerce between the several States.

However, with the Federal highway program assisting highway construction across the nation, few communities remain unexposed to an interstate highway. The "interstate" roadway may, in fact, be the primary and principal route for travel by local residents from one section of their community to another, as is substantially the situation regarding freeways within the city limits of Los Angeles.

Are, therefore, the tow service drivers for the operator of one of these local independent garages, servicing a small section within a city hundreds of miles from another state, "engaged in commerce" among the several States, when the customer for whom they bring the gas, fix the flat tire or start the car, happens to be on an "interstate" highway in the area, even though his trip may be entirely local?

The statute, if the words used are interpreted in their ordinary usage,

> "'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." (29 U.S.C. 203[b].)

seems to require more than a mere contact with an interstate route. It appears to require participation and involvement in the movement in commerce.

The cases on the subject by this court have announced various rules and tests to be applied in determining whether interstate commerce is involved. The several circuits have seemingly applied these rules differently and even the same circuit has in different cases seemed to apply the rules differently so that only confusion exists today. For example, the Ninth Circuit in the case of Mateo v. Auto Rental Company, 240 F. 2d 831, held that airporter bus service meeting the incoming planes at Hawaii Airport (and ships at the harbor) where tickets for this service could be purchased on the mainland for trips to Hawaii, which buses competed with other local services for incoming and outgoing passengers, was a strictly local activity, the drivers were not engaged in commerce and the Fair Labor Standards Act did not apply.

In the same circuit in the case of Wertz v. Intravala, 375 F. 2d 62 the concurring opinion of Justice Barnes pointed out that the Secretary of Labor did not contend that drivers of vehicles hauling materials for construction of freeways were "in commerce" (they were producing goods for commerce) . . . as their activities -- as to driving -- was not in transportation among the states.

The opinion of the same Circuit in this case, however, concludes that the rendering of service to a motorist on an interstate highway

by a local garage, in competition with other local garages, within the confines of a City hundreds of miles from a state line and without determining whether the motorist is or is not on purely a local journey, is "in commerce" among the several states within the purview of the Fair Labor Standards Act.

From a purely legal and technical viewpoint, this conclusion is further lighted by the fact that none of the employees pleaded that they were "in commerce" and there was no finding by the trial court that the "employees" themselves were in commerce.

Starting with Walling v. Jacksonville Paper Co., 317 U.S. 564, 63 S. Ct. 332, this court pointed out that this Act did not extend to businesses or transactions which merely "affected" commerce.

The Court also pointed out in this case that,

> ". . . Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states." Walling v. Jacksonville Paper Co. 317 U.S. 564, at page 570, 63 S. Ct. 332 at page 336.

This Court, in the same volume of the reports, decided the case of Overstreet v. North Shore Corporation, 63 S. Ct. 494, (318 U.S. 494) involving a toll road and drawbridge (across the

intercoastal waterway) connecting an island off the coast of Florida.

In that case, it said that such roads were indispensable to interstate movement of persons and goods and were instrumentalities of commerce. It also indicated that the operation of the drawbridge was essential to movement of traffic on the intercoastal waterway. Thus it concluded (this was a pleading case) that a cause of action was stated on behalf of employees as being in interstate commerce.

This case has been the rallying citation of those cases in the circuits which point toward the proposition that servicing, however local it may be, of interstate highways, results in the employees being in commerce. For example, see Crook v. Bryant (W. Va.), 265 F. 2d 541, involving service on 19 miles of the West Virginia turnpike, held to be in interstate commerce. And, Austford v. Goldberg, 292 F. 2d 234 (CA 8) relating to road repairs in a county of North Dakota which bordered on Canada and Minnesota.

In the same volume of the Supreme Court Reporter (but later volume of U.S. Reports) this court in the case of McLeod v. Threlkeld, 319 U.S. 491, 63 S. Ct. 1248, made a giant step toward clarification of the applicability of the Act, pointing out that the Congress had rejected proposals made to have the Act apply to those merely "affecting commerce," and laid down a test to determine applicability as follows (319 U.S. page 497):

"The test under this present act, to determine whether an employee is engaged in commerce is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it."

In that case this court held that a cook and caretaker for maintenance-of-way men on a railroad was not engaged in commerce, that his activities were purely local.

In 1945 this Court in the case of J. F. Fitzgerald Const. Co. v. Pedersen, 324 U.S. 720, 65 S. Ct. 892, held that employees who repaired abutments on bridges on which were laid railroad tracks used in interstate commerce, were themselves "engaged in commerce." and, in 1955, in the case of Mitchell v. C. W. Vollmer & Co., 349 U.S. 427, 75 S. Ct. 860, this court repeated some of the language used in the earlier McLeod case (supra), but concluded that employees engaged in construction of a lock to relieve congestion on a portion of an interstate waterway were "engaged in commerce" . . . under the Fair Labor Standards Act.

In 1960, in an opinion by Justice Frankfurter (who dissented in the Mitchell v. Vollmer case, supra), this Court in the case of Mitchell v. H. B. Zachry Company, 362 U.S. 310, 80 S. Ct. 739, which involved employees constructing a

dam for distribution of water in Texas, held that local activity such as involved in this case was not covered by the Act. There, this Court stated (362 U.S. at page 316):

> ". . . the Act also manifests the competing concern of Congress to avoid undue displacement of state regulation of activities of a dominantly local character. Accomodation of these interest was sought by the device of confinement of coverage to employment in activities of traditionally national concern. The focus of coverage became 'commerce' not in the broadest constitutional sense, but in the limited sense of §3(b) of the statute: 'trade, commerce, transportation, transmission or communication among the several States. . . ."

Seeming to fall into the pattern of the reasoning of this case, came the case in the Fourth Circuit (Maryland) of Wertz v. Modern Trashmobile, 323 F. 2d 451 where the activities of 19 truck drivers hauling industrial waste in Baltimore - much of which was in fact shipped in interstate commerce - was determined to be a strictly local activity meeting the everyday needs of the community and not involved "in commerce" under the Fair Labor Standards Act.

Looking to the expression of this court in Mitchell v. Zachry case (supra), and the reasoning and application of the same rules in

the Wertz v. Modern Trashmobile case (supra), the auto service garage industry, which consists predominately of small local operators, concluded that being local in operation to meet the everyday needs of the local motorists, their activities, too, were not of "traditionally national conern" and their employees were not covered by the Act.

The Secretary of Labor, of course, has challenged this and has constantly sought the expansion of his jurisdiction to the farthest ends of the spectrum. However, until this Court finally settles this issue of law, he is prohibited by the very Act itself from bringing an action on behalf of employees in this industry seeking overtime compensation and penalties.

> ". . . this authority to sue shall not be used by the Secretary of Labor in any case involving an issue of law which has not been settled finally by the courts, and in any such case no court shall have jurisdiction over such action or proceeding initiated or brought by the Secretary of Labor if it does involve any issue of law not so finally settled." Section 16(c) Fair Labor Standards Act (29 U.S.C. 216 [c]).

In this industry, service is required by the motoring public at all hours of the day and night, thus, with most of the operators - as is the case with the petitioner herein - it is a 24 hour a day and a seven day a week operation. Minimum

wages is not the question for tow truck auto service operators command much higher wages than provided by the Minimum Wage law. The issue which is always technically raised is that of "overtime compensation" but in reality, it is "how do you arrive at the total compensation paid?"

To get a good operator of a service vehicle it is necessary to pay above the average wages. The operator is not concerned as to how the figure is computed but does demand a high take-home pay. This is paid him. Because the garage owner cannot see how he is involved in interstate commerce, no breakdown of the wage is made. The driver is simply paid the high wage for a sixty hour work week. It would be an easy thing to compute the same wage within the purview of the Secretary of Labor's regulations by setting a lower rate for the first 40 hours and time and a half for those hours over 40 (but there usually is a reduction in wages because of mathematical problems) and come out with almost the same rate. But again, many of the garage owner will permit a man who wants to earn extra money for his family to take a tow truck home with him or to take one after hours and cruise, paying him a percentage (usually 40 to 50 per cent) of all business brought in.

Here the garage owner and the Secretary of Labor can find no common meeting ground. For, if the Act applies the operation is prohibitive and the man must be laid off -- at least insofar as any after hours cruising and as to any

commission operations are concerned -- to the loss to the local community of extra good service and loss to the employee involved of opportunity to receive extra earnings.

Because this issue of law has not been finally determined, there is much litigation in the trial courts, both State and Federal involving this question. While the Secretary of Labor cannot sue under Section 16(b) of the Act (because this issue of law has not been finally determined by this court) he stimulates and encourages employees into filing suits through private counsel and in instances where they decline to act he often sues under Section 17 of the Act for injunctive relief and to "restrain withholding of payment of . . . overtime compensation." Decisions in such trial courts, State and Federal, have not been uniform on this issue.

It follows, that once this issue has been determined by this Court it will alleviate and reduce a vast case load in the trial courts involving this legal question. For, with certainty as to whether there is, or is not, coverage by the Act, litigation in this field should substantially abate.

2. What Constitutes a "Resale" of Services Within the Retail Exemption of the Fair Labor Standards Act (Sec. 13(a)(2) of the Act, 29 U.S.C. 213 (a)(2)), Is Also a Question of Substance Never Previously Determined By This Court and One Which Affects the Auto Service Industry and Other Local Service Businesses Across the Country.

In the auto service garage industry a large percentage of the roadside service calls are to individual motorists whose vehicle has experienced a disability such as a flat tire or a dead battery, which individuals pay the service garage directly for this service.

However, in many communities some service calls may be billed to and paid directly by an automobile club of which the motorist is a member and there is no re-billing for this service to the member. Can it be said that there is a "resale," that is, the act of selling again, this service? Is there a "second sale"?

Those in the auto service garage industry contend that there is no resale. They assert that the sale is to the club with a direct charge made for each service call within a limited area, and with the member to pay for service beyond the limits. Since the member is not

charged for this service -- even though he pays an annual membership fee which entitles him to many services other than auto road-side assistance -- there cannot be a re-sale, . . . a second sale of the services. The Court of Appeals in this Case ruled to the contrary.

Auto service garages often are called upon by automobile dealers and automobile repair shops to tow a disabled vehicle from some location to the dealer's establishment or repair shop. The automobile dealer and the repair shop pays the service garage directly for this service. The practice prevailing in many areas - as was the practice testified to be in use in this case - is for the automobile dealer or automobile repair shops to absorb this tow charge and not to pass it on to the customer.

Under such circumstances the local garage operators contend that the services are not for "resale." They have billed the customer with whom they dealt. He is the end of the line. He has not resold this service.

The Appellate Court in this Case takes a different view. It considers this a resale contending that the cost is passed on in the form of increased repair rates (although there is no evidence in the record pointing to such a conclusion).

Does not every item which goes into the operation of a business have to be taken into consideration in determining overhead cost? Even so, is that a "resale"?

Surely the Congress has adequate assistance in selecting words. Can it be said that they are so inarticulate that they cannot select the proper wording for such a transaction if that is what they intended? "Resale" is a rather clear term. It means "selling again" or a "second sale."

Websters New International Dictionary, 2d Edition, page 2117.

While this issue may not have the impact of issue No. 1 above in the auto service garage industry, nevertheless, the determination of what is a "resale" of services does affect an even wider cross section of our economy. All businesses in this nation engaged in service sales are affected by the determination of this question.

There appear to be few cases at the reported level involving service sales. One, at the lowest level, but which appears to be well reasoned, is that of Mitchell v. Krout, 150 F. Supp. 857 (DC Cal) where private investigators' services were sold, many of which sales were to insurance companies and lawyers who paid for such services. Obviously, the insurance companies and lawyers would include the cost of such fees as a part of their

overhead in billing their own customers. Nevertheless, the court concluded that this was a local type of retail establishment and within the retail exemption -- thus services not for resale.

The Appellate Court in this Case, in reversing the trial court (which concluded there was no resale) relied upon the case of Mitchell v. Sherry Corine Corp. (4th Cir.), 264 F. 2d 831, Cert. denied (1959), 360 U.S. 934.

That was a case involving production of goods for commerce, the sale of meals to airlines. The ruling of the court therein was that the products (meals) were resold by the airlines indirectly and thus the retail exemption did not apply.

The case did not involve service sales. Services are only rendered once and cannot be in turn reused. With meals or products there is an area of distinction. The products or meals can be purchased, kept on hand and then resold to customers. This does not appear feasible as to services, especially of the type involved in the transactions here before the court. Once the services of roadside service has been rendered that is the end of the line. It cannot be re-delivered or re-sold.

This question is therefore one which perplexes the industry and because of the uncertainty which exists regarding the same,

necessarily results in much litigation at the trial level. Its clarification by this court would contribute to lessening litigation in this field.

3. What Is a "Collective Action" Requiring the Filing By Parties of Written Consents in Order to Stop the Running of the Statute of Limitations Under the Fair Labor Standards Act, Is Another Question of Substance Never Previously Determined By This Court, Which Is of Substantial Significance to All Litigants Under the Act.

As the law exists since the 1966 amendments, except in cases of a willful violation (which is three years), actions to recover for overtime compensation under the Fair Labor Standards Act are "forever barred unless commenced within two years after the cause of action accrued. . . ."

29 U.S.C. 255.

In determining when such an action is "commenced," in the case of

". . . a collective or class action . . . it shall be considered to be commenced in the case of any individual claimant - (a) on the date

when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court . . . or (b) if such written consent was not so filed or if his name did not so appear - on the subsequent date on which such written consent is filed in the court . . . ." (Underscoring added.)

29 U.S.C. 256

From the foregoing it is noted that in two types of actions written consents must be filed with the court to stop the running of the statute. Those are, "collective" actions and "class actions."

Collective actions are obviously different from class actions. Some cases have indicated that "collective actions" are group actions.

Burrell v. La Follette,
97 F. Supp. 279, 283 (DCED Tenn. N.D. 1951).

Some courts at the District level have pointed out that affirmative action on the part of individual plaintiffs in a "collective" action is necessary to show knowledge of the litigation on their behalf and their willingness to participate therein and to be so represented and to bind them by final judgment.

Shane v. Armour,
40 F. Supp. 488.

In the Burrell v. La Follette case (supra), the court held this to be a "collective action," there being 32 plaintiffs specifically named in the complaint but only one signed the verification. There the court stated (page 282):

> "This, it seems is clearly an intent to maintain an action for the collective benefit of all of the plaintiffs."

In this present case, one action was commenced by a single plaintiff who signed the complaint. Thereafter, and before service of process, an amended complaint was filed to add ten more names as plaintiffs. There was no verification of this amended complaint. It did not contain separate causes of action for each of the named plaintiffs, but rather they were all collectively put in the single cause of action.

Some many months later these plaintiffs signed answers to written interrogatories in the suit.

The trial court ruled that this was a collective action requiring the filing of written consents and that the signing of answers to the written interrogatories constituted written consents, stopping the running of the statute of limitations and being the "commencement of the action" as to such plaintiffs at that time.

The Circuit Court disagreed, ruling, in effect, that as long as one was named as a plaintiff - without other showing of knowledge on his part of the existence of the action - it was not a collective action and the action was commenced as of the date of the filing of the complaint without the necessity of filing of written consent by him.

It characterized a collective action as one apparently brought for the benefit of "unamed plaintiffs" rather than a group action by a number of named plaintiffs.

It pointed to the case of Deley v. Atlantic Box & Lumber Corp. (D. N. J. 1954), 119 F. Supp. 727) as supporting its conclusion.

Oddly, the Deley v. Atlantic Box, etc. case seems rather to support the opposite view. That was an action by four plaintiffs, with a cause of action being separately stated for each of the plaintiffs. Such was not the fact here.

In that case the court distinguished the Burrell v. La Follette case (supra), pointing out the difference that there a number of parties were named as plaintiffs but only one signed the complaint (as in this case before the court). The court went on to point out that in such a situation there was but one plaintiff before the court who, in effect, was seeking to sue for himself and the other employees named, which is a typical collective action situation requiring

the filing of written consents.

It would appear that what the Circuit Court has done in this case is fail to note the distinction between "class actions" - where the suit is on behalf of unnamed parties - and "collective" actions - where named parties collectively sue in one suit with but a single cause of action . . . it being an action for the collective benefit of all of the named plaintiffs.

The ruling of the Circuit Court in this case has clouded the interpretation of this section 256 (of 29 U.S.C.) relating to the requirement of filing written consents, and has added confusion to the meaning of the term "collective" action used in such section. The result is and will be uncertainty of application, and consequently lack of uniformity of application, of the requirement for filing of written consents by employees seeking to recover for overtime compensation under the Fair Labor Standards Act.

As this issue can affect all who may be subject to the provisions of the Fair Labor Standards Act - and in every industry - it should be finally settled by this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit in this case.

Respectfully submitted,

G. G. BAUMEN

Attorney for Petitioner

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OTTO D. GRAY, etc., et al.,
Plaintiffs-Appellants,
v.
SWANNEY-McDONALD, INC.,
Defendant-Appellee.
No. 24,476

WILLIAM LAWMAN,
Plaintiff-Appellant,
v.
SWANNEY-McDONALD, INC.,
Defendant-Appellee.
No. 24,504

[January 4, 1971]

Appeal from the United States District Court
for the Central District of California

Before: CARTER, HUFSTEDLER, and TRASK, Circuit Judges

HUFSTEDLER, Circuit Judge:

Appellants, 12 tow truck drivers, appeal from the dismissal of their action against Swanney-McDonald, Inc., seeking to recover overtime compensation to which they claim entitlement under section 7(a)(1) of the Fair Labor Standards Act, 29 U.S.C. § 207(a)(1). Appellants contend that the district court erred in holding that Swanney-McDonald was exempted from coverage of the Act by 29 U.S.C. § 213(a)(2) and in holding that part of their claims were barred by limitations. Appellees respond that the district court correctly decided both issues, but that it need not have decided either had the court not erred in finding that appellant's work was in interstate commerce.

We first take up appellee's contention that the appellants were not engaged in interstate commerce and thus were not subject to

the Act. Swanney-McDonald, Inc., is a California corporation having its principal place of business in Los Angeles where it operates an automotive tow service garage providing tow service and emergency road service for disabled motor vehicles in the greater Los Angeles area. Appellants were the drivers who did the actual towing and road servicing. Among the areas they serviced were a number of Interstate and U.S. Highways making up the freeway system of Los Angeles. On rare occasions calls were made out of this area, and on even rarer occasions calls were made out of state. The total number of such calls constituted less than one percent of appellee's business.

The servicing of traffic moving on interstate highways is a significant part of interstate commerce, but, appellee argues, its employees spent so little time doing that work that the interstate aspect of their duties was *de minimis*. The district court thought not, and we agree. The provision of towing and road services for the national highway system is essential to the free flow of traffic on that system. The fact that such services are a small part of appellee's business renders them no less important to interstate commerce. Even if appellee's contribution to interstate commerce was, by itself, quite small, we cannot ignore the cumulative effect that the many small companies in appellee's position have upon commerce between the states. By regularly servicing vehicles on the Interstate and U.S. Highways, appellee has become part of an industry the cumulative effect of which upon interstate commerce is substantial. Congress intended the Fair Labor Standards Act to cover such an industry, which necessarily means that the Act covers each and every member of that industry. The only way to regulate the whole is to regulate each discrete part. The fact that any given, or every given, company's contacts with interstate commerce are extremely small is irrelevant. *(Dickenson v. United States* (9th Cir. 1966) 353 F.2d 389. *See also Southern California Freight Lines v. McKeown* (9th Cir.) 148 F.2d 890, *cert. denied* (1945) 326 U.S. 736.)[1]

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[1]Appellee mistakenly relies upon *Mateo v. Auto Rental Co.* [(9th Cir. 1957) 240 F.2d 831] as holding the contrary position. In that case the district court found that none of the defendant's activities involved interstate commerce at all. There was, therefore, no problem with the cumulative effects of small contributions to the flow of goods for there was no contribution at all.

Beyond the requirement that the employees of the business in question be engaged in interstate commerce, the Fair Labor Standards Act contains a specific exemption for "retail or service establishments" which meet certain requirements as to the volume and source of their business. Retail or service establishments are defined as any establishment "75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry . . . ." 29 U.S.C. § 213 (a) (2). Appellants do not challenge appellee's right to an exemption if the appellee can qualify as a retail or service establishment. They contend that the district court's implied finding that appellee was such an establishment was clearly erroneous because appellee did not prove that no more than 25 per cent of its business was for resale. The issue turns on the nature of the business done for the National Auto Club and for local automobile repair shops. During the years in question, appellee towed cars for members of the National Auto Club and charged the Club directly. The Club did not bill its members directly for that charge, but absorbed it as part of its overhead. Similarly, appellee towed disabled vehicles to repair shops that did not in turn charge the vehicle's owner directly, but absorbed the cost as overhead. Appellee seizes upon this business practice to argue that these transactions are not sale of services for resale. The district court apparently adopted that argument;[2] we do not. Particularly persuasive is the decision of the Fourth Circuit in *Mitchell v. Sherry Corine Corp.*, 264 F.2d 831, *cert. denied* (1959) 360 U.S. 934. The issue was whether or not the sale of meals to airlines was not for resale because the airlines did not directly charge the passengers for the meals. The court held that the meals were for resale, emphasizing the economic reality that the cost of the meals was reflected in the price paid for the ticket. Appellee's situation

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[2] Although the district court did not make an explicit finding to this effect, such a finding is implicit in its finding that appellee did 75 percent of his business not for resale. In establishing the percentage of business done not for resale in order to gain an exempt status the burden of proof is on the party claiming the exemption. *Idaho Sheet Metal Works v. Wirtz*, 383 U.S. 190 (1966). In this case, appellee introduced no evidence as to the percentage of his dollar volume attributable to these sales. Therefore, the district court could not have found that appellee had met its burden unless the court found that these sales were not for resale.

is identical: The cost to the Auto Club and to the repair shops of appellee's towing services was not a gift to their customers; the cost was passed on in the form of increased membership fees and repair rates and resold as surely as if it had been part of an itemized bill. Therefore, unless appellee can establish on remand that these items constituted 25 percent or less of the dollar volume of his business, it is entitled to no exemption from coverage of the Fair Labor Standards Act.

The appellants next challenge the district court's ruling that their respective claims for compensation were, in part, barred by the two-year limitation period prescribed by 29 U.S.C. § 255. Appellants worked for Swanney-McDonald at various times during the period 1964 to 1966. The action was filed in August 1968.[3] The court held that limitations was not tolled by the filing of the complaint, but only by the claimants' filing answers to interrogatories. The holding was based upon the cou t's interpretation of and application of 29 U.S.C. § 256, which provides in pertinent part:

> "In determining when an action is commenced for the purposes of section 255 . . . an action . . . shall be considered to be commenced on the date when the complaint is filed; *except that in the case of a collective or class action* instituted under the Fair Labor Standards Act of 1938 . . . , it shall be considered to be commenced in the case of any individual claimant—
>
> "(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or
>
> "(b) if such written consent was not so filed or if his name did not so appear—on the subsequent date on which such written consent is filed in the court in which the action was commenced." (Emphasis added.)

The court decided that the appellants' complaint was a "col-

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[3]Not all of the appellants joined in the original complaint; one filed his own action. The actions were consolidated for trial and will, for simplicity's sake, be referred to as though brought as one from the beginning. The effect of the statute of limitations on the rights of each of the individual appellants will, of course, depend upon the date on which the original complaint in which he was named was filed.

lective'' action and that no ''consent'' had been filed until responses were made to interrogatories.

The Act itself does not define the unusual expression ''collective action.'' But the legislative history indicates that Congress intended the term to apply only to a representative action. The Conference Report states that a ''collective action [is] an action brought by an employee or employees for and in behalf of himself or themselves *and other employees similarly situated. . . .*'' (H.R. Rep. No. 326, 80th Cong., 1st Sess. p. 14.) (Emphasis added.) The intent was to limit the res judicata effect of an action under this Act to those who chose to be involved in it. *(Deley v. Atlantic Box & Lumber Corp.* (D.N.J. 1954) 119 F. Supp. 727.) This action was not brought for the benefit of unnamed plaintiffs, or in the name of any plaintiff who was suing in a representative capacity. Each plaintiff sued for himself. No res judicata effect could attach to anyone other than the named parties. The joinder of several plaintiffs in a single action does not convert their individual suits into a ''collective or class action.''

The judgment is reversed and the cause is remanded for further proceedings consistent with the views herein expressed.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1970
No. 1 5 4 4

SWANNEY-McDONALD, Inc.,

Petitioner,

vs.

OTTO D. GRAY, etc., et al.,

Respondents.

SWANNEY-McDONALD, Inc.,

Petitioner,

vs.

WILLIAM LAWMAN,

Respondent.

ON PETITION FOR A WRIT
OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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IN THE
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WILLIAM LAWMAN,

Respondent.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A-1 - A-5) is reported at 436 F. 2d 652. The

findings and conclusions of the district court (C. T. 272-275)[1/] are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1971. The petition for rehearing en banc was denied on February 1, 1971. The petition for a writ of certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly ruled that employees of petitioner, who regularly towed disabled and wrecked vehicles from interstate highways, and removed glass and other obstructions, were engaged

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1/ "C. T. " references are to the Clerk's Transcript which is the appendix on appeal under Rule 4 of the Court of Appeals for the Ninth Circuit. "R. T. " references are to the Reporter's Transcript. "Pet. A" references are to petitioner's appendix.



"in commerce" within the meaning of the Fair Labor Standards Act.

2. Whether the court of appeals correctly ruled that towing services performed by petitioner for auto clubs and automotive repair shops were sales for resale within the meaning of Section 13 (a)(2) of the Fair Labor Standards Act.

3. Whether the court of appeals correctly ruled that the joinder of eleven plaintiffs in a single action did not convert the individual suits into a "collective or class action" within the meaning of Section 7 of the Portal-to-Portal Act and Section 16 (b) of the Fair Labor Standards Act.

STATUTES INVOLVED

Sections 3 (b) and 16 (b) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201, et seq., and Section 7 of the Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U.S.C. 251, et seq., are set forth at pp. 4-6 of petitioner's brief. The other relevant statutory provisions provide in pertinent part as follows:

> "SEC. 13 (a), FAIR LABOR STANDARDS ACT. The provisions of sections 6 and 7 [the Act's minimum wage and overtime

provisions] shall not apply with respect to * * *

"(2) any employee employed by any retail or service establishment, * * * if more than 50 per centum of such establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located * * *. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; * * *." 2/

"SEC. 5, PORTAL-TO-PORTAL ACT. Representative Actions Banned. --

"(a) The second sentence of section 16 (b) of the Fair Labor Standards Act of 1938, as amended, is amended to

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2/ The Fair Labor Standards Amendments of 1966 (80 Stat. 830), which became effective on February 1, 1967 (subsequent to the filing of the complaints in these actions), made some changes, not relevant here, in the wording of Section 13 (a) (2).

read as follows: 'Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.'

"SEC. 6, PORTAL-TO-PORTAL ACT. Statute of Limitations. -- Any action commenced on or after the date of the enactment of this Act to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act -- (a) if the cause of action accrues on or after the date of the enactment of this Act -- may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued * * * ."

STATEMENT

These consolidated actions were brought under Section 16 (b) of the Fair Labor Standards Act by 12 named employees to recover unpaid overtime compensation, liquidated damages, and counsel fees. Petitioner admitted non-compliance with the Act's overtime requirements but denied that these employees, who worked as tow truck drivers, were engaged in commerce within the meaning of the Act, and claimed as an affirmative defense that its business was exempt under Section 13 (a) (2) as a "retail or service establishment."

Petitioner SWANNEY-McDONALD, INC. is a California corporation engaged in the business of providing towing and emergency repair services to wrecked and disabled vehicles, trucks, freight and passenger carriers in the commercial and industrial area of the City of Los Angeles and on more than ten specifically listed United States National Interstate Highways.

Respondents made from three to four calls per day to a minimum of three to five calls per week on the National Interstate Freeways throughout the entire two-year period covered by Respondents' employment (R. T. 25, 62, 250).

On these calls Respondent tow truck operators would remove disabled wrecked and overturned vehicles, glass, debris and other materials obstructing the free flow of traffic

on the various interstate freeways. Their activities ran the gamut from removing disabled automobiles on the various U.S. Highways, with broken axles and broken wheels, to removing and hauling 25 car multiple wrecks from the freeway, which necessitated the use of every piece of tow equipment and truckdriver employed by Petitioner (R. T. 269-272). It included the clearing of dead bodies from disabled automobiles and wrecks on the interstate freeways to the righting of overturned, highly explosive double trailer, butane tractor trailers blocking movement of traffic on freeways in both directions (R. T. 238-243).

In addition to towing and servicing wrecked or disabled vehicles Petitioner sold unclaimed vehicles which were damaged beyond repair to the SWANNEY-McDONALD AUTO WRECKING COMPANY, which was located at the Los Angeles Harbor, some 15 miles distant from Petitioner's place of business. Each month Respondent drivers collectively towed from 20 to 40 such vehicles from Petitioner's garage to the wrecking firm, located at the harbor, where they would be cut up and sent over seas in foreign commerce (R. T. 24-25).

Petitioner received part of its income from individual car owners. In addition to this business, however, Petitioner performed considerable work for automobile clubs, repair garages and car dealers (R. T. 12, 95-96, 260). Indeed, approximately 20 percent of petitioner's annual dollar volume was derived from one auto

club alone (R.T. 96). This customer, the National Automobile Club, had a contract with Petitioner, under which Petitioner was required to provide its members with towing and emergency repair services in the downtown area (R. T. 12, 70, 96, 101, 110-111, 138-139). The auto club, like the repair shops and car dealers, was billed on a monthly basis at rates considerably below those charged individual car owners (R. T. 138, 185-188, 191-192, 294). Although the auto club and repair shops did not charge their members and customers directly for the towing services, they considered these services in determining membership fees and repair costs (R. T. 132-133).

Both the district court and the court of appeals ruled that the activities of the tow truck drivers constituted an engagement "in commerce" within the meaning of the Act (R. T. 20; C. T. 272-275; Pet. A-1 - A-5). The district court nonetheless dismissed the complaints, concluding that petitioner met the tests for an exempt "retail or service establishment," including the requirement that "75 per centum [of its] annual dollar volume of sales or services (or of both) is not for resale" (C. T. 272-275). The court of appeals reversed, holding that the services performed under arrangements with auto clubs and repair shops were sales for resale, since the cost of such services was passed on to the automobile owners in the form of increased membership fees and repair rates (Pet. A-3 - A-4). Because petitioner failed to prove that these transactions comprised no more than 25 percent of its annual sales volume, the exemption

was held to be inapplicable.

The court of appeals also reversed the district court's ruling that the individual respondents were subject to the "written counsent" requirement of Section 7 of the Portal-to-Portal Act, applicable only to collective or class actions, and that therefore the statute of limitations was not tolled by the filing of the complaints, but continued to run until interrogatories, signed by each respondent, were filed six months later (C. T. 272-273). In reversing this holding, the court of appeals ruled that the joinder of several plaintiffs in a single action did not convert their individual suits into a "collective or class action" (Pet. A-4 - A-5).

ARGUMENT

The decision below is correct; it accords with principles well settled by the decisions of this Court, and does not conflict with decisions of any other court of appeals.

1. In holding that petitioner's employees were "engaged in commerce," the court of appeals applied the rule stated by this Court in Overstreet v. North Shore Corp., 318 U. S. 125, 128-129 (1943), that employees engaged in maintaining and improving instrumentalities of interstate commerce, and in keeping such instrumentalities free from obstruction, are engaged "in commerce" within the meaning of the Act. 3/

3/ In Overstreet, where the employer, like petitioner, stressed the local nature of its

As this Court subsequently stated in Alstate Construction Co. v. Durkin, 345 U.S. 13 (1953), "roads and railroads are in law and in fact integrated and indispensable parts of our system of commerce among the states," and "he who serves interstate highways and railroads serves commerce" (345 U.S. at 16).

3/ (Continued)

activities, this Court held that employees engaged in operating, maintaining and repairing a privately owned toll road and drawbridge connecting an interstate highway with an island were "so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it' * * *," since "without their services these instrumentalities would not be open to the passage of goods and persons across state lines" (318 U.S. at 130). The Overstreet rationale has been applied in numerous decisions upholding the Act's coverage: Wirtz v. B. B. Saxon Company, 365 F. 2d 457 (C.A. 5) (employees maintaining and sweeping air base runways); Austford v. Goldberg, 292 F. 2d 234 (C.A. 8) (employees repairing and maintaining county, township and State roads); Crook v. Bryant, 265 F. 2d 541 (C.A. 4) (employees providing wrecker and towing services on an intrastate segment of a turnpike); Ritch v. Puget Sound Bridge & Dredging Co., 156 F. 2d 334 (C.A. 9) (employees dredging channels in navigable waters); Walling v. McCrady Const. Co., 156 F. 2d 932 (C.A. 3), cert. den. 329 U.S. 785 (employees repairing and relocating roads, streets, and bridges).

The fact that petitioner derived only a small part of its income from services performed on interstate freeways[4/] does not, as petitioner contends, remove its employees from the Act's protection. These employees admittedly provided towing and road services to interstate highways on a regular and recurring basis. This being so, the doctrine of de minimis does not apply. Maryland v. Wirtz, 392 U.S. 183 (1968); Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946).[5/]

4/ Petitioner's claim that such services comprised less than 1% of its business is not factually accurate. Based on figures offered by petitioner's president at trial, the percentages run from 6% to 9% (R.T. 147-149).

5/ Among the more recent of numerous decisions sustaining coverage for employees who participate regularly and recurringly in interstate activities -- even where such activities comprise only a small fraction of the employer's total business and do not require substantial time for performance -- are: Shultz v. Kip's Big Boy, 431 F.2d 530 (C.A. 5, 1970); Wirtz v. F. M. Sloan, Inc., 411 F.2d 56 (C.A. 3, 1969); Wirtz v. Durham Sandwich Co., Inc., 367 F.2d 810 (C.A. 4, 1966); Dickenson v. U.S., 353 F.2d 389 (C.A. 9, 1965), cert. denied 384 U.S. 908; Wirtz v. Crystal Lake Crushed Stone Co., 327 F.2d 455 (C.A. 7, 1964); Telephone Answering Service v. Goldberg, 290 F.2d 529 (C.A. 1, 1961).

2. The court of appeals correctly held that the Section 13 (a) (2) exemption was not applicable in the absence of any proof that petitioner's sales to auto clubs and repair shops did not exceed 25 percent of its total sales.[6] The court's ruling that these services were sales for resale accords with the decisions of every court of appeals that has ruled on the "resale" issue.

Contrary to petitioner's contention (Pet. 25), the "resale" test applies not only to sales of goods but -- by its very terms -- to "sales of goods or services (or of both) * * * " (emphasis added). Moreover, as the court of appeals recognized, the "resale" nature of these transactions is not destroyed by the fact that the auto clubs and repair shops did not specifically bill their members (or customers) for towing and road repair services, but rather absorbed

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6/ It is, of course, well settled that exemptions from the Fair Labor Standards Act "are to be narrowly construed against the employers seeking to assert them" and that the burden of proof is upon the employer to show that he comes "plainly and unmistakably within their terms and spirit." Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392, 394; Mitchell v. Kentucky Finance Co., 359 U.S. 290-291, 295; Phillips Co. v. Walling, 324 U.S. 490, 493.

these costs as overhead.

Directly in point is Mitchell v. Sherry Corine Corp., 264 F. 2d 831, cert. den. 360 U. S. 934 (1959). In that case, the operator of an airport dining room contended that its sales of flight meals were not sales for resale since the purchasing airline did not specifically charge its passengers for the meals. Rejecting this contention, the court pointed out that the meals "are purchased by the airline not for self-consumption but for consumption by the passengers and although no separate specific charge is made, the cost is an operating expense taken into account in computing the rates of transportation" (264 F. 2d at 835).

This ruling in Sherry Corine was held to be "determinative" in Goldberg v. Furman Beauty Supply, Inc., 300 F. 2d 16, where the Third Circuit ruled that the sales by a supplier of lotions, rinses and other preparations to various beauty parlors were "for resale" even though the beauty parlors did not charge their customers separately for supplies used in whatever services the beautician performed for the customer.

Sherry Corine was also cited by this Court in Arnold v. Ben Kanowsky, Inc., 361 U. S. 388 (1960), where it held that sales of aircraft parts "made with the expectation that the parts would be incorporated in aircraft and that the aircraft would be sold * * * are clearly within the concept of resale"

(361 U.S. at 394). Applying this principle to the instant case, the court of appeals held that the services performed by petitioner under arrangements with auto clubs and repair shops also came within the resale concept. As the court explained, these services were part of the total package provided by auto clubs and repair shops to the individual car owner; their cost was considered in determining membership fees and repair rates and petitioner's services were thus resold as surely as if they had been part of an itemized bill.

Since sales to the one auto club were shown to comprise approximately 20 percent of petitioner's annual dollar volume of business, and since petitioner made no attempt to show the extent of its sales to repair shops, the court of appeals was clearly correct in holding that petitioner had failed to prove one of the "explicit prerequisites to exemption" (Arnold v. Ben Kanowsky, Inc., supra, 361 U.S. at 392). As this Court ruled in Idaho Sheet Metal Works v. Wirtz, 383 U.S. 190 (1966), in any case where there is "unclarity as to the precise percentages of dollar volume attributable to the various sales, * * * the employer's burden of proof has not been met," and the exemption cannot be sustained (383 U.S. at 209).

3. The court of appeals correctly held that the joinder in one complaint of eleven named plaintiffs, pleading separate causes of action, was not a "collective or class" action within the meaning of Section 7 of the Portal-to-

Portal Act. This holding not only accords with numerous district court decisions, 7/ but it also is the only conclusion consistent with the legislative history and limited purpose of the "written consent" requirement added to Section 16 (b) of the Fair Labor Standards Act by Section 5 of the Portal-to-Portal Act, and applied to the statute of limitations provisions by Section 7 of the Act.

Section 7 provides that for purposes of the two-year statute of limitation (set forth in Section 6 of the Portal-to-Portal Act) an action under the Fair Labor Standards Act "shall be considered to be commenced on the date when the complaint is filed * * * ." The one exception to this general rule is that

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7/ Stephens v. Asker, 18 WH Cases 706, 59 CCH Lab. Cas. para. 32, 127 (M.D. Fla. 1967, not officially reported), affirmed per curiam 394 F.2d 513 (C.A. 5); Jeter v. International Harvester Co., 17 WH Cases 661, 55 CCH Lab. Cas. para. 31, 913 (N.D. Tex. 1966, not officially reported); Wallace v. Water Tank Service Company, 256 F.Supp. 689 (W.D. Okla. 1966); Mitchell v. Mace Produce Co., 163 F.Supp. 342 (D. Md. 1958); McDonald v. Martinelli, 120 F.Supp. 383 (S.D. N.Y. 1950); McDonald v. Martinelli, 120 F.Supp. 382 (S.D. N.Y. 1953); and Deley v. Atlantic Box & Lumber Corp., 119 F.Supp. 727 (D. N.J. 1954).



"in the case of a collective or class action" it shall not be considered to be commenced "in the case of any individual claimant" until such claimant has filed with the court "his written consent to become a party plaintiff." While Section 7 does not specifically define what is meant by "a collective or class action," the term, as the court of appeals recognized, obviously has reference to certain representative actions authorized by Section 16 (b) of the Fair Labor Standards Act, as amended by Section 5 of the Portal-to-Portal Act. This section, as amended, provides that actions may be brought "by one or more employees for and in behalf of himself or themselves and other employees similarly situated," but that no employee "shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party" and such consent is filed in court (emphasis added).

That the term "collective or class action" refers only to such representative actions -- and not to actions brought by several individually named plaintiffs -- is confirmed by the legislative history of the Portal-to-Portal Act. Thus, the Conference Report, in explaining Section 7, states that a "collective action [is] an action brought by an employee or employees for and in behalf of himself or themselves and other employees similarly situated, and a class action [is] an action described in Rule 23 of the Federal Rules of Civil Procedure." H. Rep. No. 326, 80th Cong., 1st Sess., p. 14,



emphasis added.

Similarly, with respect to Section 5, which amended Section 16 (b) of the Fair Labor Standards Act so as to require written consents in certain limited instances, the Report states that although "collective actions brought by an employee or employees (a real party in interest) for and in behalf of himself or themselves and other employees similarly situated may continue to be brought," "no employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court" (H. Rep. No. 326, supra, p. 13, emphasis added).

It is apparent from these legislative excerpts, as pointed out by the court of appeals, that the sole purpose for requiring written consents was to limit the "res judicata effect" of a Section 16 (b) action to those persons actually named and made known to defendant (Pet. A-5). The first of the two actions filed here was not a class suit brought by one or more employees on behalf of other unidentified employees.

The Respondents' First Amended Complaint specifically and separately named eleven plaintiffs. The introduction to the complaint was on behalf of each plaintiff. There was no allegation that the suit was commenced on behalf of any other employee similarly situated. The parties were known, specifically named and each plaintiff alleged

his individual citizenship, a specific and different employment period, and separate causes of action, although not separately stated, for overtime work for the defendant (C. T. p. 5). The prayer of the Amended Complaint prayed for judgment on behalf of the specifically named plaintiffs for the amount determined to be due each plaintiff for unpaid overtime compensation (C. T. 6). Each plaintiff propounded Interrogatories to the defendant, requesting detailed data as to each of the individuals named as plaintiffs, relating to the period of employment, time of termination, job duties and classification, hours worked and compensation paid. The nature and extent of the pleadings clearly showed knowledge and participation of each plaintiff for his individual purpose and benefit, contrary to the contentions of petitioner.

The case of Shane v. Armour, 40 F. Supp. 488, cited by Petitioner as a "collective" action requiring knowledge of the litigation on behalf of employees, is not a contrary authority. That case was a "class" suit brought by one plaintiff on behalf of other employees similarly situated. No other employees were specifically named in the amended complaint and no allegations as to specific amount of overtime employment were made with reference to any employee other than plaintiff (p. 489).

There is no conflict of opinion between the courts of appeal on this issue of the statute of limitations, and the petition presents no novel

questions as to the issue of written consent.

CONCLUSION

The decision of the court of appeals is sound in law and just in fact and does not require further review.

We respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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